

November 25, 1997

BANGOR HYDRO-ELECTRIC COMPANY
Request for Advisory Ruling as Part
of the Documentation Process Related
to the Consummation to the PERC Contract
Restructuring Transaction

ADVISORY RULING

WELCH, Chairman, NUGENT and HUNT, Commissioners

I. SUMMARY

In this Advisory Ruling, the Commission concludes that Bangor Hydro-Electric Company (BHE) is not statutorily required to obtain a certificate of public convenience and necessity to enter an amended purchase power agreement (PPA) with the Penobscot Energy Recovery Company (PERC). The Commission also concludes that a revenue sharing arrangement that is part of an agreement to lower BHE's purchase power costs does not violate the statutory restriction of utilities having a financial interest in generating assets.

II. REQUEST FOR RULING

On October 2, 1997, BHE filed a Petition for Advisory Ruling pursuant to Chapter 110, section 601 of the Commission's rules. The request is related to the consummation of the PERC contract restructuring transaction recently approved by the Commission in Docket No. 97-451. By Orders dated August 27; September 17; and October 10, 1997, the Commission approved a rate stabilization agreement (Agreement), that involves financing through the Finance Authority Of Maine (FAME), pursuant to 35-A M.R.S.A. § 3156.

The Agreement, which was entered into by BHE, PERC and the Municipal Review Committee (MRC),¹ is intended to lower BHE's costs related to its current PERC PPA. This PPA obligates BHE to purchase the output of PERC's 21.16 megawatt waste-to-energy facility in Orrington, Maine; the plant is a qualified facility (QF) as defined in 35-A M.R.S.A. § 3303. Under the Agreement, PERC's net revenues, after costs, are shared equally among PERC, BHE and the MRC. BHE's cost savings derive from its one-third share of PERC's net revenues; the rates in the PERC PPA remain

¹ The MRC is an organization that represents municipalities that currently have long-term waste disposal contracts with PERC.

unchanged. Additionally, as part of the Agreement, the MRC becomes a party to the amended PPA.

BHE requests that the Commission issue two rulings: (1) that the amended PPA does not require a certificate of public convenience and necessity pursuant to 35-A M.R.S.A. §§ 3133 or 3133-A because the contract is with a small power producer; and (2) that the revenue sharing component of the Agreement does not violate the "financial interest" restriction in 35-A M.R.S.A. § 3204(5). BHE is seeking the advisory ruling at the request of FAME as part of the process of consummating the transactions to implement the Agreement.

III. COMMISSION RULING

A. Applicability of Certificate Requirements

BHE requests that the Commission issue an opinion that the amended PERC PPA is excluded from the requirements of sections 3133 and 3133-A. Section 3133 requires a utility to obtain a certificate of public convenience and necessity before purchasing generating capacity or energy. Section 3133-A requires a utility to obtain a certificate of public convenience and necessity before entering any significant agreement relating to generating capacity and energy. Both sections exclude purchases from QFs from these certification requirements. 35-A M.R.S.A. §§ 3133(7), 3133-A(3).

As stated above, PERC is a QF as defined in 35-A M.R.S.A. § 3303. The question is whether the MRC's participation in the amended PPA nullifies the QF exclusion and causes it to be subject to either section 3133 or 3133-A.

Although the MRC will become a party to the amended PPA, BHE will not actually purchase any generating capacity or energy from the MRC. BHE will continue to purchase power from PERC, which is a QF under state law. Accordingly, we conclude that BHE is not required to obtain a certificate of public convenience and necessity under either section 3133 or 3133-A before purchasing power under the amended PPA.

B. Financial Interests

BHE requests that the Commission find that the revenue sharing component of the Agreement does not violate the "financial interest" restriction included in 35-A M.R.S.A. § 3204. Section 3204 is part of the recently enacted restructuring legislation, P.L. 1997, ch. 316, and governs the divestiture and separation of utility generation assets and power contracts. Specifically, section 3204, subject to some

exceptions, requires utilities to divest their generation assets and sell the output of their QF contracts by March 1, 2000. Section 3204(5) specifies that, after March 1, 2000, a utility may not own, have a financial interest or otherwise control generation assets, except as otherwise permitted.

The purpose of the divestiture section of the restructuring statute is to provide for full corporate separation of competitive generation services from regulated transmission and distribution (T&D) services. This separation is intended to avoid market abuses that could occur if a utility uses its status as monopoly provider of T&D services to obtain generation service business for itself or affiliates. Based on both the language of the statute and its underlying purpose, we conclude that the revenue sharing component of the Agreement does not constitute a financial interest under section 3204(5).

Section 3204(5) is explicitly subject to other provisions of the divestiture section. These provisions do not require utilities to divest or sell their QF contracts. Instead the separation is accomplished by a sale of the utilities' right to the power under QF contracts. Consistent with statutory requirements, BHE will sell its rights to power from the PERC facility by March 2000, pursuant to section 3204(4), while continuing to be the buyer under the PERC PPA. The revenue sharing component of the Agreement is simply a means to, in effect, reduce the rates for which BHE purchases power under the PERC PPA and is part of BHE's efforts to mitigate what might become stranded costs. BHE's ultimate sale of the output of the PERC PPA fulfills the separation requirement of section 3204 and the receipt of rebates under the Agreement is part of its obligation to minimize stranded costs under section 3208. Because BHE's activities with respect to the PERC PPA are otherwise permitted under the restructuring statute, the revenue sharing component of the Agreement is not prohibited by section 3104(5)'s "financial interest" restriction.

In addition, the purpose underlying the "financial interest" restriction is not implicated by the Agreement. Because BHE will sell its rights to power under the PERC PPA, it could not benefit from any attempts to use its monopoly status as a T&D provider to favor generation from the PERC facility. If BHE were to act in this manner, it would only benefit the purchaser of the rights to power from the PERC PPA; it would not financially benefit BHE. The stimulation of retail sales of power from the PERC facility would not change the amounts BHE pays to PERC under the PPA or the amounts of the rebates under the revenue sharing arrangement. Thus, "financial interest," as that term is used in section 3204(5), should not be construed to include a revenue sharing arrangement of the type at issue,

because prohibiting such an arrangement could not serve the purpose embodied in the statute.

The revenue sharing agreement among PERC, BHE, and the MRC is part of a complex arrangement intended to lower BHE's costs associated with the PERC PPA; the effort is consistent with State policies that seek to reduce the cost of purchased power contracts assisted by FAME financed transactions. Although BHE has some interest in the successful operations of the PERC plant by virtue of the revenue sharing arrangement, by complying with section 3204(4) and selling its output to the plant, BHE does not have a "financial interest" within the meaning of section 3205(5).

Dated at Augusta, Maine this 25th day of November, 1997.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Nugent
 Hunt